File: A42 998 610 - Eloy

Date: MAY 11 2000

In re: GLENN DONN MILLANG MUCEROS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jonathan Diamond, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Adjustment of status; waiver of inadmissibility

In a decision dated October 19, 1999, an Immigration Judge found the respondent removable under sections 237(a)(2)(C) and (a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(C) and (A)(2)(A)(ii), pretermitted his application for adjustment of status, found him ineligible for any other form of relief, and ordered him removed to the Philippines. The respondent has appealed this decision. The appeal will be sustained in part, and the removal charge under section 237(a)(2)(A)(ii) of the Act will be vacated. The remainder of the appeal will be dismissed.

I. BACKGROUND

The respondent is a 23-year-old native and citizen of the Philippines who entered the United States as a lawful permanent resident on or about June 28, 1991. *See* Exh. 5. On May 8, 1998, the respondent was served with a Notice to Appear which charged him removability under section 237(a)(2)(C) of the Act, as an alien convicted of a firearm violation. It was alleged that on October 27, 1997, the respondent was convicted in the Superior Court at Sacramento, California, for the offense of discharging a firearm at a vehicle in violation of section 246 of the California Penal Code.

In a Form I-261 dated June 1, 1998, the Service charged the respondent with removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. §1101(a)(43)(F), for a crime of violence. *See* Exh. 2. It was alleged that the respondent's October 27, 1997, conviction resulted in a 5 year sentence of incarceration, with the execution of the sentence suspended.

In a Form I-261 dated November 16, 1998, the Service charged the respondent with removability under section 237(a)(2)(A)(ii) of the Act, as an alien convicted of two crimes involving moral turpitude not arising of a single scheme of criminal misconduct. *See* Exh. 4. The additional allegation was that on January 22, 1997, the respondent was convicted in the Superior Court at Sacramento, California, for the offense of force and violence against a person in violation of Cal. Penal Code § 243(d). For this crime, the respondent received a 120 day sentence of incarceration with a 3 year period of probation.

II. THE PROCEEDINGS

The parties appeared for numerous hearings, and we will summarize the main events. The Service presented conviction records which supported the convictions as alleged. *See* Exhs. 6-7. The respondent produced documents to show that on October 20, 1998, his sentence for discharging a firearm at an occupied vehicle was modified, and the 5 year suspended sentence was deleted.[1] *See* Exh. 3. The Service subsequently withdrew the aggravated felony removal ground. *See* Tr. at 109.

The respondent wanted to be considered for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. He presented evidence that he had married a United States citizen on February 12, 1999, and that she had filed a visa petition on his behalf. *See* Exh. 10-B. The Service filed a motion to pretermit the application for adjustment of status. *See* Exh. 9. It asserted that because the respondent had been convicted of crimes involving moral turpitude, he would need a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), before he could receive adjustment.[2] However, he did not qualify for the waiver as a lawful permanent resident because he had not continuously resided in the United States for a period of more than 7 years preceding the date of the initiation of his removal proceedings. *See* section 212(h) (final paragraph).

The respondent filed briefs explaining why neither of his crimes should be considered to be crimes involving moral turpitude. *See* Exhs. 10-D, 10-H. At the time of the final hearing, the record also contained documentation of the respondent's immigration history (Exh. 5), and various documents related to his request for adjustment of status.

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[1] The modification also states that the Court "to impose" a 5 year suspended sentence on the defendant's first violation of probation.

[2] We note that a firearms violation alone would not render an alien ineligible for adjustment of status. *See Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992).

III. THE DECISION OF THE IMMIGRATION JUDGE AND THE APPEAL

In his final decision dated October 19, 1999, the Immigration Judge found that the record established the respondent's alienage and that he was a lawful permanent resident. He held that the respondent's conviction for discharging a firearm supported removability under section 237(a)(2)(C) of the Act. *See* I.J. Dec. at 4. This conviction was also found to be a crime involving moral turpitude as it involved willful behavior with potential serious consequences. The Immigration Judge also held that the respondent's other crime involved moral turpitude. He emphasized that the crime was more than simple battery, as it involved serious bodily injury to the victim. Because the crimes did not arise out of a single scheme of criminal misconduct, the Immigration Judge sustained the charge under section 237(a)(2)(A)(ii) of the Act.

The Immigration Judge agreed with the Service that the respondent was ineligible for a section 212(h) waiver of inadmissibility, and he therefore could not obtain adjustment of status. Because the respondent did not establish eligibility for any other form of relief from removal, the final removal order was entered.

The respondent has appealed this decision. He challenges the findings that both of his convictions were for crimes involving moral turpitude. Regarding his conviction for battery, he points out that Cal. Penal Code § 243(d), encompasses a broad range of actions, some of which do not involve evil or corrupt intent. Regarding the other conviction, the respondent emphasizes that the statute does not require an intent to injure or actual injury, and that the California courts have distinguished a section 246 conviction from that of assault with a deadly weapon. *See In re Daniel R.*, 24 Cal. Rptr. 2d 414 (1993). Finally, the respondent argues that the current version of section 212(h) of the Act violates his constitutional rights to equal protection under the law.

The Service has not submitted a brief on appeal. On review, we conclude that the appeal should be sustained in part, but that the respondent remains removable from the United States and ineligible for relief.

IV. THE DECISION OF THE BOARD

The issue before us is whether the respondent has been convicted of crimes involving moral turpitude. We first examine his conviction for willful and malicious discharge of a firearm.

A. Section 246 of the California Penal Code

The statute at issue provides that

> Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited house car, as defined in section 362 of the Vehicle Code, or inhabited camper, as defined in section 243 of the Vehicle Code, is guilty of a felony, and upon

conviction shall be punished by imprisonment in the state prison for 3, 5, or 7 years, by imprisonment in the county jail for a term of not less than 6 months and not exceeding 1 year.

As used in this section, "inhabited" means currently being used for dwelling purposes whether occupied or not.

Cal. Penal Code § 246 (West 1999). The conviction records make it clear that the respondent was convicted for discharging a firearm at an occupied motor vehicle. *See* Exh. 6. We therefore examine whether this portion of the statute sets out a crime involving moral turpitude. *See generally Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989).

Moral turpitude is a nebulous concept, which refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *see also Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980); *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978); *Matter of S-*, 2 I&N Dec. 353 (BIA, A.G. 1945); *Matter of G-*, 1 I&N Dec. 73 (BIA, A.G. 1941). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders the crime one of moral turpitude. *See Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of P-*, 6 I&N Dec. 795 (BIA 1955). The essence of moral turpitude is an evil or malicious intent. *Matter of Flores, supra*. The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. *See Winestock v. INS*, 576 F.2d 234 (9th Cir. 1978); *Matter of Flores, supra*. Where knowing or intentional conduct is an element of a morally reprehensible offense, we have found moral turpitude to be present. *See, e.g., Matter of Danesh, supra*. Neither the seriousness of a criminal offense nor the severity of the sentence imposed therefore is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

Utilizing the above criteria, we find that the respondent's conviction under Cal. Penal Code § 246 is a crime involving moral turpitude. We consider that malicious and willful conduct is an element of the crime. Furthermore, the crime requires that the defendant shoot at an occupied vehicle, which means that persons must be inside. *See In Re Daniel, supra*, at 418. The potential for injury or death in this situation evidences the depravity of the crime. *See People v. White*, 4 Cal. Rptr. 2d 259, 263 (1992). The fact that there is no requirement that injury be intended or actually occur does not change our view of this crime. Rather, the willingness to risk the potential serious harm in this situation is enough to bring it within the realm of turpitudinous behavior. *See People v. White, supra*; *Cf. U.S. v. Weinert*, 1 F.3d 889, 891 (9th Cir. 1993) (recognizing inherent risk in shooting at inhabited building renders Cal. Penal Code § 246 a crime of violence under the United States Sentencing Guildelines).

B. The Conviction Under Section 243(d) of the California Penal Code

The respondent's other conviction was in violation of Cal. Penal Code § 243(d), which states that

> when a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for two, three, or four years.

Battery is committed whenever there is the slightest intentional touching, even though there is no intent to harm, and even if the degree of force used is unlikely to cause harm. *See People v. Thornton*, 4 Cal. Rptr. 2d 519, 521 (1992). Felony battery in California is a consummated assault in which the victim suffers serious bodily injury. *People v. Corning*, 194 Cal. Rptr. 27, 32 (1983). Felony Battery does not require mens rea of malice, but rather, requires the same intent as simple battery, that is, merely intent to commit unwanted touching, an intent which need not show readiness to do evil. *See People v. Campbell*, 28 Cal. Rptr. 2d 716 (1994).

Most relevant Board precedent deals with the crime of assault. We have held that assault may or may not involve moral turpitude. *Matter of Danesh, supra* at 670 (BIA 1988). Simple assault is not considered to be a crime involving moral turpitude. *Matter of Short, supra* at 139 (BIA 1989); *Matter of Baker*, 15 I&N Dec. 50, 51 (BIA 1974), *modified Matter of Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992); *Matter of Short, supra*. However, assault with a deadly weapon has been held to be a crime involving moral turpitude. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). In the area of assault, crimes involving moral turpitude ordinarily include an aggravating dimension. *See, e.g., Matter of Danesh, supra*, (holding that the fact that the assault was on a peace officer was a key element in establishing a crime involving moral turpitude). *See also Matter of Medina, supra.*

We have also recognized that a crime will involve moral turpitude when the perpetrator has a special relationship to the victim. *See Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (holding that the willful infliction of corporal injury on spouse, cohabitant, or parent of perpetrator's child under Cal. Penal Code § 273.5(a) is a crime involving moral turpitude). *See also Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (holding that willful infliction upon a spouse of corporal injury resulting in a traumatic condition is a crime involving moral turpitude); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (holding that willful infliction upon any child of any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is a crime involving moral turpitude).

In the current case, the level of intent involved only extends to touching the victim. No evil intent is required. The victims are not a specially protected class of persons or those who have a special relationship to the perpetrator. Under these circumstances, we do not find a crime involving moral turpitude. We recognize the argument that the element of "serious bodily injury" presents an aggravating factor which elevates the respondent's crime to one involving moral turpitude.

We adopt the reasoning of the California Courts in this regard, which have held that "[s]ince section 243 does not require an intention to do any act which would be judged to be evil by generally accepted community standards of morality, battery is not a crime of moral turpitude even though it may unintentionally result in serious bodily injury." *People v. Thornton, supra,* at 521-22 (internal cite omitted) (concluding that a past conviction under § 243 cannot be used for impeachment purposes).

We therefore find that the respondent's conviction under Cal. Penal Code § 243(d) is not a crime involving moral turpitude.

C. Resolution of Case

As is uncontested on appeal the respondent is removable under section 237(a)(2)(C) of the Act, due to his conviction for a firearms violation. The charge of removability under section 237(a)(2)(A)(ii) of the Act will be vacated, as we have concluded that the respondent has only been convicted of one crime involving moral turpitude. However, the respondent still remains ineligible for adjustment of status, because his one conviction for a crime involving moral turpitude renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act,[3] and the respondent is not eligible for a section 212(h) waiver. The respondent has not sought any other form of relief from removal, and we see none available to him. Accordingly, the appeal will be sustained in part, but the respondent remains removable from the United States. Appropriate orders will be entered.

ORDER: The appeal is sustained in part, and the finding of removability under section 237(a)(2)(A)(ii) of the Act is vacated.

FURTHER ORDER: The appeal is otherwise dismissed.

FOR THE BOARD

[3] We note that the respondent does not qualify for the "petty offense" exception at section 212(a)(2)(A)(i)(ii)(II) because a conviction under Cal. Penal Code § 246 has a maximum sentence of over one year.